

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CORPORATIONS AMENDMENT (NO.1) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry)

Table of contents

Glossary	1
General outline and financial impact	3
Chapter 1	Mutual recognition of director disqualification5
Index	11

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Corporations Act	<i>Corporations Act 2001</i>
MoU	Memorandum of Understanding
Corporations Regulations	Corporations Regulations 2001

General outline and financial impact

Amendments relating to the disqualification of directors etc

The Corporations Amendment (No.1) Bill 2008 will provide a mechanism in the *Corporations Act 2001* (Corporations Act) for recognising, in Australia, the disqualifications from managing corporations that occur in foreign jurisdictions. Initially, it is envisaged that this mutual recognition will extend only to New Zealand, but the Bill provides a mechanism to enable other jurisdictions to be added at a later date.

The Bill embodies a further incremental step towards achieving the policy goal of a single trans-Tasman economic market based on common regulatory frameworks. The achievement of this policy goal is being progressed under the Australian and New Zealand Governments' Memorandum of Understanding (MoU) on Business Law Coordination.

Date of effect: Upon Royal Assent.

Proposal announced: This measure was announced in the Minister for Superannuation and Corporate Law's Press Release No. 9 of 26 February 2008

Financial impact: Nil.

Compliance cost impact: There will be very low compliance costs imposed on business which will result only from the need to keep abreast of new regulatory requirements.

Chapter 1

Mutual recognition of director disqualification

Outline of chapter

1.1 The Bill amends the Corporations Act to provide a mechanism for recognising, in Australia, the disqualification of a person from managing a corporation that occurs in a foreign jurisdiction. This will effectively ‘close a regulatory gap’ whereby persons can currently avoid disqualification simply by moving jurisdictions.

Context of amendments

1.2 The provisions in this Bill fulfil a requirement of the work program formulated under the Australian and New Zealand Governments’ MoU on Business Law Coordination that aims to achieve a single trans-Tasman economic market based on common regulatory frameworks. The work program includes implementing a mechanism to allow for the disqualification of persons from managing companies in one jurisdiction to apply in the other jurisdiction.

1.3 There is already a high degree of commonality in this area of corporate law between Australia and New Zealand. Additionally, a degree of ‘mutual disqualification’ already exists in Australia in relation to the serious criminality of directors. However, circumstances still exist where a director who is banned in New Zealand can escape disqualification in Australia. For example, a person who is disqualified in New Zealand because they are bankrupt can still manage a company in Australia.

1.4 New Zealand has already closed this regulatory gap by enacting the New Zealand Companies Amendment (No. 2) Act 2006. This Act inserted provisions into the New Zealand Companies Act 1993 that facilitate prohibition in New Zealand of directors who are disqualified under Australian law. These amendments have been in effect since 18 June 2007. In the interests of cross-border consistency, this Bill has been modelled on the New Zealand provisions and will facilitate disqualification in Australia of directors who are prohibited in New Zealand.

Summary of new law

1.5 Under the new provisions, a person will be automatically disqualified from managing corporations in Australia if they are disqualified from being a director, or being concerned in the management, of a foreign company by a court in a prescribed country.

1.6 Additionally, the Australian Courts' power to disqualify people from managing corporations will be extended. These provisions will enable Courts to disqualify a person from managing corporations if that person has been disqualified under the law of a foreign jurisdiction from being a director, or taking part in the management, of a foreign company, provided that the Court considers disqualification to be appropriate and justified.

1.7 Prescribed countries will be identified in the Corporations Regulations 2001 (Corporations Regulations). Initially, New Zealand will be the only prescribed country; however, this mechanism will allow for other countries to be added at a later date.

1.8 The amendments will operate prospectively.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The new law adds an additional circumstance to the current list of circumstances in which a person can be automatically disqualified from managing corporations. The new provision means that a person will be automatically disqualified from managing corporations in Australia where they have been disqualified by a court in a prescribed country.	<p>The Corporations Act, in general, does not currently provide for automatic recognition under Australian law of disqualification from managing corporations under the law of a foreign jurisdiction.</p> <p>The sole circumstance in which current law results in a person being automatically disqualified from managing corporations in Australia is where that person has been convicted of serious criminal activity. Specifically, where that person has been convicted of an indictable offence concerning the management or financial standing of a company; an offence involving dishonesty that is punishable by imprisonment of at least three months; or an offence against the law of a foreign country that is punishable by imprisonment of a period greater than 12 months.</p>

Comparison of key features of new law and current law (continued)

<i>New law</i>	<i>Current law</i>
The new law adds to the powers of an Australian Court to disqualify a person from managing corporations. A Court will be given the power to disqualify a person where that person has been automatically disqualified by operation of the law of a prescribed country, or by a body other than a court in a prescribed country (for example a regulator).	The current law does not provide a mechanism by which a Court in Australia can recognise the disqualification of a person from managing corporations in Australia that occurs under the law of a foreign jurisdiction.

Detailed explanation of new law

1.9 This Bill provides a mechanism in the Corporations Act for recognising, in Australia, the disqualification of a person from managing corporations that take place in a foreign jurisdiction. The Bill will effectively ‘close a regulatory gap’ whereby persons can avoid disqualification simply by moving jurisdictions.

1.10 These provisions are a requirement under the MoU on Business Law Coordination between the Australian and New Zealand Governments. New Zealand’s mutual disqualification provisions that recognise director disqualifications that occur under Australian law, became operational in 2007.

1.11 The provisions in the Bill differentiate between disqualification by a court in a foreign jurisdiction, and automatic disqualification (such as by operation of law or by a regulator) in a foreign jurisdiction.

1.12 If a court in a foreign jurisdiction makes an order disqualifying a person from being a director of a company in that jurisdiction, or being concerned in the management of a foreign company, that person will be automatically disqualified from managing corporations in Australia.
[Schedule 1, item 2, subsections 206B(6) and (7)]

1.13 Where a person is disqualified from managing corporations under the law of a foreign jurisdiction, or from activities which are substantially similar to managing corporations, an Australian Court can disqualify that person from managing corporations in Australia on application by ASIC. In deciding whether to disqualify a person in Australia, the Court must be satisfied that the disqualification in the

foreign jurisdiction was justified. A Court's decision in this regard can include consideration of that person's conduct in relation to the company. The Court can also determine the appropriate period of disqualification under this provision and, in doing so, may have regard to the period of disqualification that was imposed in the foreign jurisdiction. *[Schedule 1, item 3, section 206EAA]*

1.14 For example, ASIC could make use of this provision where a person was disqualified from managing corporations by a regulator in a foreign jurisdiction, as opposed to the order of a court. This will ensure that all disqualifications of people from managing corporations that are effective under Australian law have been the subject of deliberation by a court, either within Australia or in the foreign jurisdiction.

1.15 In these provisions, a 'foreign jurisdiction' means a foreign country, or part of a foreign country, that is prescribed by the Corporations Regulations as a foreign jurisdiction for the purposes of these provisions. *[Schedule 1, items 2 and 3, subsections 206B(6) and (7) and section 206EAA]*

Application and transitional provisions

1.16 The provisions contained in this Bill commence operation upon Royal Assent.

1.17 The provisions relating to automatic disqualification and Court ordered disqualification, apply to orders by a court of a foreign jurisdiction, and disqualifications under the law of a foreign jurisdiction, that are made, or arise, on or after commencement of these provisions. *[Schedule 1, item 4, section 206H]*

Consequential amendments

1.18 Currently, section 206H of the Corporations Act means that, generally, the disqualification provisions in Part 2D.6 of the Corporations Act do not apply to acts or omissions of a person while managing a foreign company.

1.19 The Bill contains a provision that ensures that the provisions allowing for a disqualification in a foreign jurisdiction to apply in Australia are exempted from the application of section 206H of the Corporations Act. *[Schedule 1, item 7, sections 1485 and 1486]*

1.20 Currently, paragraph 199A(3)(c) of the Corporations Act provides that a company must not indemnify a person against legal costs incurred in defending an action for liability incurred as an officer of the company if the costs are incurred defending or resisting proceedings brought by ASIC for a court order if the grounds for making the order are found by the court to be established. Note 1 to this paragraph states that this includes proceedings brought by ASIC for an order under sections 206C, 206D or 206E of the Corporations Act, which are disqualification provisions.

1.21 The Bill contains a provision that will ensure that the new section 206EAA of the will also fall under the provision contained in paragraph 199A(3)(c). [*Schedule 1, item 1, section 199A(3) Note 1*]

1.22 Currently, subsection 1274AA(1) provides that ASIC must keep a register of persons disqualified from managing corporations under sections 206C, 206D, 206E, 206EA and 206F of the Corporations Act. Subsection 1274AA(2) also provides that the register must contain a copy of court orders made under those sections of the Corporations Act.

1.23 The Bill contains provisions that will ensure that ASIC keeps a register of persons disqualified under the new section 206EAA and that the register contains a copy of the court order made under that section.

Index

Schedule 1:

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1, section 199A(3) Note 1	1.21
Items 2 and 3, subsections 206B(6) and (7) and section 206EAA	1.15
Item 2, subsections 206B(6) and (7)	1.12
Item 3, section 206EAA	1.13
Item 4, section 206H	1.17
Item 7, sections 1485 and 1486	1.19